Section 78 imposes penalties for the infringement of by-laws.

The Board having constructed or become possessed of warehouses which must be regarded as a normal and necessary adjunct to a port such as Singapore could elect whether to let them out to others for periods less than 3 years (or with consent of the Governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a Harbour Board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorised by the Ordinance by which they were created a Harbour Board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers.

Counsel for the appellants stressed the fact that in so doing they were in the words of Viscount Maugham "acting under a power to carry on a trade" and he further argued that in so doing they entered into a contractual relationship both with the appellants and the shipping company, or alternatively only with the shipping company, and that the existence of this contractual relationship which gave rise to the liability of the Board arose out of a private trading transaction.

It would, however, be putting much too narrow a construction on Viscount Maugham's language to interpret it as meaning that every act done under a power to trade must always be a mere subsidiary power. He was doing no more than give an instance of a subsidiary power having in mind, no doubt, the facts in the *Bradford Corporation case*[1]. Furthermore as previously stated the existence or non-existence of a contract is not a decisive test and on the facts in the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the Board were exercising their permissive powers to perform a normal function of a Harbour Board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly entitled to the protection of the Public Authorities Protection Ordinance.

In the result their Lordships feel no difficulty in deciding on which side of the line this case lies and are in agreement with the conclusion reached by the majority of the Court of Appeal. Mr. Justice Evans in his dissenting judgment held that there was no public duty on the Board to run a warehousing business. He says the public had not been consulted and might have preferred to deal with private traders, and after quoting Viscount Maugham he finds that the Board is carrying on a trade and there was no evidence that it was acting for the public benefit. From what has been already stated it will be seen that this view does not give sufficient weight to the word "authority" as distinct from "duty" and would appear to lay more emphasis on the words "such as a power to carry on a trade" than was intended in the context in which they were used.

In agreeing, however, with the conclusion reached by the majority their Lordships think it right to observe that they are not able to accept the test laid down by the Chief Justice in that portion of his judgment where in dealing with the interpretation of the decision in the *Bradford case*[1] he says: "The Corporation was obliged to supply gas and authorised to sell coke. This distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive".

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

K. E. MOHAMED IBRAHIM v. M. MOHAMED IBRAHIM.

[Orig. Civ. Juris. (Buhagiar, J.) June 14, 1952]

[Selangor — Civil Suit No. 262 of 1951]

Trade Marks — Interim injunction — Application for — Balance of convenience.

The plaintiff and the defendant are both manufacturers of hair oil; the plaintiff trading as Zam Zam Chemical Works and the defendant as Ramzan Chemical Works. The plaintiff is the registered proprietor of a trade mark consisting of the words "Zam Zam" and of certain devices; he sells the hair oil manufactured by him in boxes or cartons coloured green, pink and blue. Some time ago the plaintiff discovered that the defendant was selling hair oil not manufactured by the plaintiff bearing a trade mark consisting of the word "Ramzan" and got up in a manner which, the plaintiff contended, was a colourable imitation of his trade mark.

The plaintiff, therefore, commenced proceedings against the defendant in the High Court of Singapore; this suit was discontinued because the parties came to an agreement. Subsequent to this agreement the defendant made some alterations to his mark maintaining, however, the word "Ramzan". The parties do not agree as to the terms of this agreement hence the present suit. Pending the final determination of this issue the plaintiff has applied for an interim injunction.

Held, that there is no evidence that the defendant's trade mark is calculated to mislead or deceive purchasers by making them think that in buying goods of the defendant they are buying the goods of the plaintiff; as to the balance of convenience and inconvenience, the balance is in favour of the defendant and that the plaintiff's right would be sufficiently protected if the defendant undertakes to keep an account.

Cases referred to :—

(1) *Mitchell v. Henry* (1880) 15 Ch. D. 181.

(2) *Read Brothers v. Richardson & Co.* (1881) L.T.R. 54.

TRADE MARKS, Application for an interim injunction.

Cur. Adv. Vult.

Buhagiar, J. : — This is an application by the plaintiff asking for an interim injunction until the final disposal of the suit to restrain the defendant, his servants and agents from selling his goods, i.e. hair oil bearing a trade mark consisting of certain devices and the word "Ramzan" and got up in a manner which is a colourable imitation of the plaintiff's get-up; the plaintiff undertook to indemnify the defendant against any damages that he may sustain as a result of any order that may be made by the Court granting the interim injunction.

From the pleadings and affidavits it appears that the plaintiff and the defendant are both manufacturers of hair oil; the plaintiff trading as Zam Zam Chemical Works and the defendant as Ramzan Chemical Works. The plaintiff is the registered proprietor of a trade mark consisting of the words "Zam Zam" and of certain devices; he sells the hair oil manufactured by him in boxes or cartons coloured green, pink and blue. Some time ago the plaintiff discovered that the defendant was selling hair oil not manufactured by the plaintiff bearing a trade mark consisting of the word "Ramzan" and got up in a manner which, the plaintiff contended, was a colourable imitation of his trade mark.

The plaintiff, therefore, commenced proceedings against the defendant in the High Court of the Colony of Singapore; this suit was, however, discontinued because the parties came to an agreement. Subsequent to this agreement the defendant made some alterations to his mark maintaining, however, the word "Ramzan" The parties do not agree as to the terms of this agreement hence the present suit. The plaintiff contends that the terms upon which the Singapore suit was settled were those contained in the document signed by the defendant the 26th June, 1951. (Marked "A" in plaintiff's affidavit of the 15th May, 1952).

On the other hand the defendant alleges that the terms for the Settlement of the suit were those contained in the document signed by him — a copy of this document is marked "MM1" in the Statement of Defence — this document bears the date 5th October, 1951; it is not clear whether this date is the date on which the document was signed or the date on which the stamp was affixed. The defendant's defence is that when he signed the document of the 26th June, 1951, the contents were not explained to him; on the contrary, he contends that he was told that it was a formality repeating the terms of settlement contained in the document attached to his Statement of Defence marked "MM1".

The main issue between the plaintiff and the defendant is as to the terms of the settlement of the Singapore suit. Pending the final determination of this issue the plaintiff has applied for an interim injunction.

The defendant opposed the granting of such interim injunction; it was submitted that the question whether the injunction is to be granted or not depends on whether or not the plaintiff has a *prima facie* case and this is to be decided on the pleadings and on such affidavits as have been filed by the plaintiff and the defendant; in granting or refusing an interim injunction the Court should be guided principally by the balance of convenience, that is, by the relative amount of damage which seem likely to result if the injunction is granted and the plaintiff ultimately fails, or if it is refused and he ultimately succeeds. It was submitted on behalf of the defendant that in the present case the balance of convenience was in his favour and the plaintiff would be sufficiently protected if defendant were ordered to keep an account. *Mitchell v. Henry*[1] was relied on.

The principles governing the granting or refusing an interim injunction are dealt with in *Mitchell v. Henry*[1] and *Read Brothers v. Richardson & Co.*[2] in the former case an interim injunction was granted, but was refused in the latter.

There are two points which I think should be considered in cases of this nature :—

(a) whether there is sufficient evidence, prima facie, to entitle the plaintiff, in the absence of any contradiction of it or any explanation, to succeed finally at the hearing; and

(b) the balance of convenience.

With regard to (a) the question can, at this stage, be considered only by relation to evidence available from the pleadings and affidavits. There are, I think, two questions to be answered in the present case, namely:—

(a) Does this evidence show that the defendant's marks are calculated to deceive purchasers by making them think when they are buying his goods that they are buying the goods of the plaintiff?; and

(b) Is the defendant as a result of the terms of agreement in the Singapore suit precluded from using the mark he is now using?

It is not my intention to dispose finally of this point, but at present my impression is that the answer to both questions is in the negative.

There is similarity in the marks of the plaintiff and the defendant in so far as the colour and design of the cartons or boxes in which their goods are sold. It was pointed out by the learned Counsel for the defendant that the words used in such marks (i.e. "Zam-zam" in the case of the plaintiff and "Ramzan" in the case of the defendant) have distinctive and completely different meanings. No evidence was produced on this point; it is, however, a fact that these words are not made up words for purposes of a trade mark; they are Hindustani words of Arabic origin. According to Ram Narain Lal's Student's Practical Dictionary (Hindustani-English) "Ramzan" is "the Ninth Muhammadan month during which they are interdicted from eating, drinking and conjugal duty between dawn and sunset. On the 27th of this month Quran began to descend from heaven." "Zam-zam" is the Sacred Well in Mecca (see Sir William Muir's Life of Mohamed); it is also, I believe a fairly common name amongst Hindu girls. For purposes of a trade mark, therefore, "Zam-zam" is as different from "Ramzan" as "Milkmaid Milk" is from "Bear Brand Milk." Apart and independently of this, however, there is no evidence, at this stage, that the defendant's trade mark is calculated to mislead or deceive purchasers by making them think that in buying goods of the defendant they are buying the goods of the plaintiff.

Furthermore, at present it is not possible to decide which are the true terms of settlement of the Singapore suit; this is the main point at issue between the parties; this question must therefore wait till the final hearing. If it is upheld that the true terms are those which the defendant claims to be, then it would seem that the defendant has a claim to use the trade mark he is using now.

With regard to the balance of convenience and inconvenience, I consider that the balance is in favour of the defendant and that the plaintiff's right would be sufficiently protected if the defendant undertakes to keep an account.

On the above grounds I refuse the grant of the interim injunction; the application should stand over to the hearing, the defendant being put on an undertaking to keep an account. The costs of this application to be borne by the plaintiff.

Order accordingly.

PUBLIC PROSECUTOR v. ISHAK & ORS.

[App. Crim. Juris. (Whitton, J.) July 7, 1952]

[Kota Bharu — Criminal Appeal No. 15 of 1952]

Criminal Procedure Code (Cap. 6), ss. 158 and 173(b) — Duty of Magistrate — Penal Code (Cap. 45), ss. 403 and 406.

This was an appeal by the Public Prosecutor against the acquittal of the respondents who had been charged with criminal breach of trust — alternatively with criminal misappropriation of cash. It is contended on behalf of the Public Prosecutor that the learned President, Sessions Court should have acted under section 173(b) of the Criminal Procedure Code and amended the charge.

Held, that the prosecution cannot successfully maintain that a Magistrate had failed in his duty in this matter because he did not make an amendment to a charge which they did not themselves in any way suggest and based on a legal view of the facts quite different from that they themselves have put forward throughout the case.

Case referred to:—

(1) *Public Prosecutor v. Lee Pak* (1937) M.L.J. 265; (1938) F.M.S.L.R. 1.

CRIMINAL APPEAL from Sessions Court, Kota Bharu.

Cur. Adv. Vult.

Whitton, J. : — The three respondents in this case were acquitted at the close of the Prosecution case by the President Sessions Court, Kota Bharu, on the 7th April 1952, and the Public Prosecutor appeals against this decision. The respondents were originally charged under section 409 Penal Code, but during the trial the charge was amended to one under section 406 with an alternative charge under section 403. The amended charge read as follows:—

"That you on or about the 26th day of October, 1951, at Tumpat District, State of Kelantan, being jointly entrusted with certain property, to wit, cash $15 collected for the sale of meat from an unclaimed dead calf, committed criminal breach of trust; and that you thereby committed an offence punishable under section 406 of the Penal Code.

ALTERNATIVELY —

That you, on or about the 26th day of October, 1951, at Tumpat District, State of Kelantan, jointly and dishonestly misappropriated certain property, to wit cash